P. John Dick

17th Feby 1767

11th March 1767

Adhere.

Diss. Auch. Coalstoun

Kennet. Hailes

President

& [illegible] Monboddo.

FEBRUARY 14. 1767.

Unto the Right Honourable, the Lords of Council and S[illegible]n,

THE PETITION OF JOHN DICK of *Compſton*;

Humbly ſheweth,

THAT Mr. *John Macleod* of *Muiravenſide* advocate, brought a proceſs againſt your petitioner, and many others, in which he concluded, that your petitioner's lands of *Compſton* ſhould be declared aſtricted to the new mill belonging to Mr. *Macleod*.

That after a very long and tedious litigation, from the year 1755 till now, the cauſe has at laſt been fully laid before your Lordſhips, when, on the 5th of *February* 1767, you were pleaſed to pronounce the following interlocutor: Feb. 5. 1767.
" The Lords having adviſed the ſtate of the proceſs, teſtimonies of the witneſſes adduced, writs produced, with the memorials given in, and having heard parties procurators thereon, find the lands of *Highcroſt* or *Bogfield*, belonging to the defender *John Dick* of *Compſton*, are aſtricted to the purſuer's mill, as acknowledged by the defender; aſſoilzie the ſaid *John Dick* from the declara-

" tor of aſtriction as to his lands of *Compſton* and *Croſſ-*
" *crews*; but find that he is bound, by the contract 1671,
" to continue the payment of ten merks yearly, and that
" he is further bound to pay ſuch out-town multures as
" he has been in uſe to pay for what corns growing upon
" the ſaid lands of *Compſton* and *Croſſcrews* he may hence-
" forth bring to the mill, and that the purſuer and his
" ſucceſſors, heritors of the new mill, are bound to grind
" the ſaid corns at that rate; and find, that the purſuer is
" bound to recover out of the clerk's hands, and at his
" own expence, the ſaid *John Dick*'s title deeds which
" have been produced in this proceſs, and decern ac-
" cordingly."

Your petitioner would humbly preſume to intreat a review of this interlocutor; and he will be the more eaſily forgiven for preferring this requeſt, becauſe your Lordſhips, in adviſing the cauſe, appeared to view it in many different lights, and ſtarted conſiderable difficulties, of which, your petitioner muſt, with all deference, confeſs that he cannot yet ſee the ſolution.

By the firſt part of the interlocutor, your petitioner is aſſoilzied from the declarator of aſtriction; but your Lordſhips have been pleaſed to find, that he is bound, by the contract 1671, to continue the payment of ten merks yearly to the new mill of *Compſton*, and this without any equivalent, further than that the purſuer and his ſucceſſors ſhall be bound to grind what corns growing upon the lands of *Compſton* and *Croſſcrews* your petitioner ſhall bring to the ſaid mill, upon payment of ſuch out-town multures as he has been in uſe to pay for theſe corns.

Your petitioner humbly complains, that your Lordſhips have here impoſed a burden upon him of ten merks yearly, to be paid to this purſuer; for which he, with ſubmiſſion, does not apprehend that there is any ſufficient claim.

Mr. *Macleod* raiſed a declarator of aſtriction againſt your petitioner's lands, upon the plea, that they are a part of the barony of *Manuelſowlis*.

Your Lordſhips have clearly ſeen, that your petitioner's half of *Compſton* is no part of that barony, and that the mill upon the purſuer's half did not exiſt when both halfs of *Compſton* were veſted in the ſame perſon; as it is evident from the title deeds, that there was then only a wauk mill upon the lands, which has been converted into a corn mill ſometime between 1623 and 1653.

And therefore, your Lordſhips aſſoilzied the lands of *Compſton* from the declarator of aſtriction, which was concluded for in the purſuer's libel.

Your petitioner did not imagine that your Lordſhips were to pay any regard to the contract 1671 as a ſeparate and diſtinct ground of claim, as it was only uſed by the purſuer as an adminicle to ſupport his pretended conſtitution of a thirlage over your petitioner's lands.

This contract is a very ſtrange and ſingular deed, executed in the 1671 between the tackſman of the new mill of *Compſton*, and the proprietor of your petitioner's lands. It is in theſe words:

" At *Manuelmill*, the 27th day of *May* 1671 years, it is " agreed betwixt *Andrew Roſs* of *Neuck*, tackſman of the " new mill of *Compſton*, on the one part, and *Patrick Calder* of *Compſton*, on the other part, as follows: That is " to ſay, The ſaid *Andrew Roſs* has acceptit, and hereby " accepts from the ſaid *Patrick* of the ſum of ten merks " yearly, in full ſatisfaction of the haill multure and " knaveſhip payable by the ſaid *Patrick* and his tenants " of *Compſton* to the ſaid mill, for all the grindable victual " that they ſhall bring thereto, and that ſhall grow upon " the ſaid *Patrick*'s lands of *Compſton*. And the ſaid *Andrew* obliges him to cauſe the preſent miller of the ſaid " mill, and his ſucceſſors, millers thereat, grind the haill victual State, p. 43. F.

“ victual that ſhall be brought thereto be the ſaid *Patrick*,
“ and his tenants of *Compſton*, free of any multure or
“ knaveſhip, or other duty for grinding thereof, except
“ only the ſaid ten merks yearly, but prejudice to the ſaid
“ *Patrick*, and his tenants, to tranſport their corns to any
“ mill they pleaſe, without licence of the ſaid *Andrew Roſs*,
“ they always paying the ſaid ten merks. And it is hereby
“ declared, that the ſaid *Patrick*, and his tenants, ſhall
“ be free of all ſervices to the ſaid mill, except about their
“ own victual, when the ſame is brought to be grinded
“ thereat. And, on the other part, the ſaid *Patrick Calder*
“ obliges him, his heirs and ſucceſſors, to pay to the
“ ſaid *Andrew Roſs*, and, after the expiry of his right, to
“ the heritor of the ſaid mill, the ſaid ſum of ten merks
“ *Scots* money yearly, in all time coming, beginning the
“ firſt year's payment thereof at *Whitſunday* 1672 years,
“ and ſo furth yearly thereafter at the ſaid term. And
“ both parties oblige them to perform the premiſſes to others,
“ and to extend this minute in ample form, keeping
“ the ſubſtance above written, and to pay 20 *l.*
“ of penalty, in caſe of failzie, by and attour performance.”

What was the foundation of this contract your petitioner is really at a loſs to diſcover: Perhaps the heritors of *Compſton*, prior to the 1671, had been in uſe of grinding at the new mill, and the agreement then made, was, that he ſhould have ten merks in full of all this multure. This appears, not only from the words of the contract itſelf, but from the after diſcharges granted in conſequence of it, as your Lordſhips ſee in page 69th of the ſtate, where is found,

State, p. 69. H.

“ Diſcharge by *Andrew Johnſton* miller of *Compſton* mill,
“ to *Patrick Calder* of *Compſton*, for ten merks *Scots* money,
“ addebted be him to me, as for an *year's multure due by*
“ *him for the grinding of the corns growing upon the lands of*
“ Compſton,

“ Compſton, pertaining to him, crop and year of God
“ 1673 years laſt bypaſt, whereof I hold me well content,
“ ſatisfied and paid, and diſcharges the ſaid *Patrick Calder*
“ and his tenants, and all others whom it effeirs, of the
“ ſaid year's multure, and of all other years preceeding the
“ year above diſcharged for ever.” Written by *William Kerr*, ſon to Mr. *Andrew Kerr*, ſheriff clerk of *Linlithgow*, dated 11th *June* 1674.

Nothing can be more formal than this diſcharge, or more clearly indicate the intention of parties, that the ten merks ſhould be received in full ſatisfaction of all demands by the miller of the new mill.

Your Lordſhips afterwards ſee, in page 70th of the State, a diſcharge for the year 1686, by *Robert Fiſher* miller at *Manuelmill*, in theſe terms: State, p. 70. B.

“ Be thir preſents, grant me to have received from *John*
“ *Dick* portioner of *Compſton*, the ſum of ten merks *Scots*
“ money; and that, for his dry multure payable be him
“ for his lands of *Compſton*, and that for the crop 1686,
“ payable at *Lammas* laſt bypaſt.” This plainly imports, that it was a multure in money, and not in meal.

There is another light in which many of your Lordſhips ſeemed to view this contract, which, indeed, appears to your petitioner extremely probable, *viz.* that the tackſman of the new mill, perhaps, with colluſion of the proprietor, had certainly a ſcheme of inſenſibly drawing in the petitioner's lands to his thirlage.

This he very cunningly thought to do, by contracting to grind the corns of *Compſton*, for a very trifling conſideration, which would entice the proprietor of theſe lands to come regularly to his mill, and then, thought he, I will, upon the ground of long preſcription, purſue him for a declarator of thirlage, blow up the contract, which will have ſerved as a ſcaffolding to this claim, and include him hard and faſt within the bounds of my ſucken.

This project was truly ſly enough; but unluckily for the tackſman, the law does not allow an aſtriction to be founded on the payment of dry multure, for which a plain agreement can be qualified; and it would be extravagant to ſuppoſe, that ten merks could be accepted as an equivalent for intown multures.

With whatever view this contract was originally conceived, your petitioner humbly apprehends, that it cannot now have the effect which the interlocutor of your Lordſhips has given to it.

It is humbly ſubmitted to your Lordſhips, how far a real burden can be laid on lands by a perſonal deed, whereon no infeftment hath followed; and conſequently, how far this contract can be binding on ſingular ſucceſſors.

According to the interlocutor now complained of, the payment of ten merks will be as much a burden upon your petitioner and his ſucceſſors, as if it were a feu-duty in the *reddendo* of his charter; and this merely in favour of the purſuer, who it is not pretended has either right of property, ſuperiority, or ſervitude upon your petitioner's half of the lands of *Compſton*.

But your petitioner humbly apprehends, that the import of this contract in reality *non eſt hujus loci*, and that your Lordſhips decerniture upon that head is *ultra petita* of the libel.

The purſuer brought a proceſs for a declarator of aſtriction of your petitioner's lands, which he very confidently averred was eſtabliſhed upon irrefragable legal evidence; and the only uſe he pretended to make of this contract, was, to plead upon it as a preſumption to corroborate his claim. Your Lordſhips, by aſſoilzieing the petitioner's lands from aſtriction to the purſuer's mill, have totally deſtroyed this boaſted claim, and therefore the preſumption muſt fall to the ground.

In the State of this proceſs, page 15th, G, the purſuer himſelf has argued in the ſtrongeſt terms againſt the validity of this contract, upon the ſuppoſition of there being no aſtriction: " For—ſays he—who can imagine that " the ſmallneſs of an annual dry multure, ſo ſcandalouſly " retrenched below what was ſo juſtly payable, according " to the accuſtomed uſe of the mill, and quantity of multure payable thereat, and that only by a tackſman, " without the authority of his conſtituent, the proprietor, " would have prevailed with any man of ſenſe, to ſubject " his lands, himſelf, and his ſucceſſors, to a perpetual " burden, had he not been previouſly bound, as now ap" pears beyond contradiction, to have been the caſe?" State, p. 15. G.

Thus argues the purſuer; and as it now appears beyond contradiction, that the defender was not previouſly bound, he thinks he is well intitled to turn the purſuer's artillery againſt himſelf.

And upon this principle, he will alſo be allowed to call upon your Lordſhips attention to the very unfavourable opinion which the purſuer hath entertained of the contract:—He thus ſtrongly expreſſes himſelf, St. p. 16. C. " As the aſtriction is total, it is needleſs to enter upon the " import of that iniquous void deed." It is impoſſible for the defender to ſay any thing ſtronger. State, P. 16. C.

Your petitioner has all this time ſaid nothing with regard to ſuch out-town-multures as he has been in uſe to pay for the corns which he has got grinded at the purſuer's mill; theſe he humbly contends have been *meræ voluntatis*, and can be conſidered in no other light, than as a free gift to the mill, on account of extraordinary trouble, which no tract of time can eſtabliſh as an obligation.

Your petitioner muſt, with all deference, maintain, that the contract 1671, if it is to be looked upon as a valid deed tranſmiſſible to ſingular ſucceſſors, muſt be mutually binding upon both parties, according to the preciſe terms in which it is conceived.

Your Lordſhips are therefore intreated to conſider theſe terms, which are no other, than that the tackſman obliges himſelf and his ſucceſſors, to grind the whole victual growing upon the defender's lands of *Compſton*, free of any other multure, except ten merks yearly; and on the other part, the proprietor obliges himſelf and his heirs, to pay the ſaid ſum of ten merks yearly.

It is hoped that your Lordſhips, upon a review of this cauſe, will not be of opinion, that the one party here ſhould be bound, and the other free, which it is humbly apprehended is adverſe to equity, and inconſiſtent with the very idea of a contract.

If your Lordſhips ſhall decree, that this contract, as explaining itſelf, is ſtill a ſubſiſting deed, to which both parties muſt accede, your petitioner ſhall be highly ſatisfied; he will, when he pleaſes, grind all his corns at the new mill of *Compſton*, and will moſt faithfully pay the ten merks, which is literally all that he is required to do by the contract. The tackſman's plot will then be no great advantage to the purſuer, the biter will be bit, and his ingenuity will have its proper reward.

Could the defender have ſuppoſed, that this contract could have been canvaſſed ſo much as it has been, he might have founded upon it as a permanent deed, to prove a paction highly advantageous to him, and therefore might have prayed your Lordſhips to ſuſtain it; but he was adviſed, that as it was a perſonal deed, it could not be pleaded upon againſt a ſingular ſucceſſor.

If your Lordſhips ſhall think otherwiſe, and by your deciſion give validity to this contract, your petitioner hopes that you cannot refuſe to confirm it, according to the plain intendment of this very curious tranſaction.

Your petitioner has no doubt but he will, at any rate, chooſe henceforth to reſort with his grain to the purſuer's mill, as at preſent it is eaſieſt and moſt commodious for him; but then he would wiſh to pay the miller according as he performs his work, which would entitle your petitioner to be ſerved with more readineſs and civility than if he is conſidered as in ſome meaſure bound to the mill.

Your petitioner does allow, that ten merks a-year is a very trifling ſum, and that your Lordſhips may, at firſt view of this conteſt, very probably think *non eſt tanti.*

But your petitioner views the matter in this light, that every ſervitude, particularly that of aſtriction, is moſt unfavourable; and he would be very unwilling to have this ſervitude of ten merks yearly, ſmall as it is, impoſed upon him to perpetuity: Your Lordſhips have declared him free from the aſtriction which the purſuer laid claim to, and yet you have left upon him a ſervitude, which ſurely participates of the nature of aſtriction.

Were the contract to ſtand good as explaining itſelf, there would then be a ſubſiſting mutual contract of which your petitioner could not complain: But, in conſequence of the enlarged interpretation given to it by the interlocutor of your Lordſhips, your petitioner is for ever tied down to pay to the purſuer an yearly tribute of ten merks, for which, indeed, he may, if he pleaſes, have his corns ground a little cheaper than other people; but ſhould he have an opportunity of a mill more convenient for him than that of the purſuer, or ſhould he even build a mill of his own, theſe ten merks will ſtill remain a burthen upon him, without any conſideration in return.

Freedom is always to be preſumed in property; it is dear to every man, and has an imaginary eſtimation not eaſily to be purchaſed.

Your Lordſhips will believe, that your petitioner values very little the trivial annuity of ten merks; but he thinks it would be hard to ſubject him any how to his neighbour, without the ſtrongeſt cauſe: He would wiſh to be free of every thing which can infer his having the ſmalleſt dependence upon the purſuer, and would not pay him any acknowledgment whatever, were it even a ſheaf of corn, or a ſilver ſixpence.

Your petitioner humbly hopes he has ſaid enough to convince your Lordſhips, that as he is totally free from any original aſtriction to the purſuer's mill, ſo is he free from any ſubſequent burden.

He muſt be allowed to ſay, that he has defended himſelf in this proceſs in the moſt genteel and candid manner, and would complain to your Lordſhips, that he has moſt unwillingly been dragged along through a tedious litigation. Your Lordſhips will ſee in the ſtate of this proceſs, that after your petitioner's title deeds had been produced and argued upon, a condeſcendence of facts was ordered to be given in, inſtead of which, the purſuer, at next calling, inſiſted for a proof at large, in which he included your petitioner, notwithſtanding of a very maſterly repreſentation by one of your petitioner's counſel, from which it was clear, that he could have no concern with the proof; he offered to produce every paper, to anſwer every queſtion, nay, to confeſs every circumſtance of uſage that the purſuer could prove by his numerous witneſſes; and yet your petitioner has been compelled to take a part in this proof, and been put to a charge of above 30 *l.* to no purpoſe whatever.

State, p. 33. H.

Coſts of ſuit are not to be granted but in extraordinary caſes. Your petitioner leaves it with your Lordſhips, if he has not a very good claim for expences; he will not urge this as he would urge an argument important to his cauſe; he knows how ridiculouſly this claim is often made, and that every country procurator, in every cauſe, ends his petition with *expences and abſolvitor*.

There is ſomething mean in aſking expences in an anxious and mendicant ſtrain, which can have no influence with your Lordſhips, who muſt be determined by the circumſtances of the caſe. He will, therefore, ſay no more on this head, and ſhall chearfully acquieſce, whatever ſhall be your Lordſhips opinion.

May it therefore pleaſe your Lordſhips to alter your former interlocutor, ſo far as to find, that your petitioner is not bound, by the contract 1671, *to pay ten merks yearly to the purſuer, except the purſuer ſhall alſo be bound to grind your petitioner's whole corns growing on his lands of* Compſton, *free of any other multure but theſe ten merks, in terms of the contract; and, if your Lordſhips ſhall think it warranted by the particular circumſtances of this cauſe,—to grant your petitioner his expences.*

According to juſtice, *&c.*

JAMES BOSWELL.